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## Touro Law Review

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Volume 33 | Number 3

Article 20

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2017

### Protecting Subject Children in Family Court and beyond: The Necessity to Utilize Identical Confidentiality Measures between Article 6 Lincoln Hearings and Article 10 Lincoln Hearings

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#### Recommended Citation

Kaufman, Bradley (2017) "Protecting Subject Children in Family Court and beyond: The Necessity to Utilize Identical Confidentiality Measures between Article 6 Lincoln Hearings and Article 10 Lincoln Hearings," *Touro Law Review*: Vol. 33 : No. 3 , Article 20.

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**PROTECTING SUBJECT CHILDREN IN FAMILY COURT AND  
BEYOND: THE NECESSITY TO UTILIZE IDENTICAL  
CONFIDENTIALITY MEASURES BETWEEN ARTICLE 6  
LINCOLN HEARINGS AND ARTICLE 10 LINCOLN HEARINGS**

*Bradley Kaufman*\*

**I. INTRODUCTION**

Family Reunification is defined as the “process of returning children in temporary out-of-home care to their families of origin.”<sup>1</sup> Reunification is the ultimate goal and objective sought for families whose children were removed from the family home.<sup>2</sup> In Custody and Visitation proceedings (Article 6 of the Family Court Act of New York)<sup>3</sup>, a Family Court judge has jurisdiction and authority to award custody of the subject children to family members other than the children’s parents, such as grandparents, if the familial circumstances warrant such an order.<sup>4</sup> This means parents will temporarily, sometimes even permanently, be stripped of their custody and visitation rights over their own children if a judge determines the arrangement will be in the children’s best interest.<sup>5</sup> Similar orders can

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<sup>1</sup> CHILD WELFARE INFORMATION GATEWAY, *Family Reunification: What the Evidence Shows* 1, 2 (2011), <https://www.childwelfare.gov/pubPDFs/familyreunification.pdf>.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> N.Y. FAM. CT. ACT § 651 (West, Westlaw through L.2017, ch. 1 to 6).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

also be issued in Abuse and Neglect Proceedings (Article 10 of the Family Court Act of New York)<sup>6</sup>, resulting in temporary or permanent removal of the children from their parents' homes to be placed in the custody of another suitable relative, if the placement is in the children's best interest.<sup>7</sup> The ultimate goal for families experiencing a removal scenario in Abuse and Neglect matters is reunification of the family in the foreseeable future.<sup>8</sup> Generally, federal law in the United States requires the ultimate goal of family reunification to be achieved within twelve months of removal of the children from the family residence.<sup>9</sup> The reunification decision is, of course, subject to a best-interest-of-the-child analysis.<sup>10</sup>

The Children, Youth and Families Act 2005<sup>11</sup> (CYFA) from the Victorian Parliament of Australia<sup>12</sup> provides clear "best-interest principles"<sup>13</sup> for children. CYFA also offers considerations to be weighed to further the children's best interests regarding the reunification of a family. For example, CYFA provides that "when determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development . . . must always be

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<sup>6</sup> § 1055 (Westlaw).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 1055 (iii)(C).

<sup>9</sup> Stacey M. Saunders-Adams, *Reunification and Reentry in Child Welfare: A Systematic Review and Meta-analysis*, 24 NAT'L SYMPOSIUM ON DOCTORAL RESEARCH IN SOC. WORK 1, 1 (2012), [https://kb.osu.edu/dspace/bitstream/handle/1811/52994/24\\_5\\_saunders-adams\\_paper\\_kb.pdf](https://kb.osu.edu/dspace/bitstream/handle/1811/52994/24_5_saunders-adams_paper_kb.pdf).

<sup>10</sup> § 1055 (Westlaw).

<sup>11</sup> *Children, Youth and Families Act 2005* (Act No. 96/2005) ch 1 s 10 pt 1.2 div 2 (Austl.) [hereinafter CYFA].

<sup>12</sup> The author decided to use Australia's "best-interest principles" in this Note because the CYFA lists a plethora of considerations that the judge must follow when making a decision in Family Court proceedings. For example, the best-interest principles in the CYFA span approximately three pages in the Act, which includes subsections one through three, with subsection three having subsections a through r. *See* CYFA, *supra* note 11. All subsections and sub-subsections contain thorough and specific considerations a judge must follow with "any other relevant consideration" being the last consideration mentioned. *See* CYFA, *supra* note 11, at para 3r. This list, although illustrative, is not exhaustive, but provides a judge with a myriad of additional considerations he may not have ordinarily considered if it was not otherwise explicitly listed. *See* CYFA, *supra* note 11, at para 3. By contrast, New York's best-interest principles lists approximately eight bullet points of considerations for a judge to evaluate in making his decision. *Best Interest of the Child*, NYCOURTS, [www.nycourts.gov/courthelp/family/bestInterest.shtml](http://www.nycourts.gov/courthelp/family/bestInterest.shtml) (last visited Mar. 7, 2017). Although not an exhaustive list either, it provides less guidance and significantly fewer factors to consider from the onset of such a proceeding. *Id.*

<sup>13</sup> CYFA, *supra* note 11, at ch 1 s 10 pt 1.2 div 2 para 3.

considered.”<sup>14</sup> Additionally, CYFA states that consideration relevant to the need “to strengthen, preserve and promote positive relationships between the child and the child’s parent, family members and persons significant to the child”<sup>15</sup> must be assessed to determine if a decision or an action will be in the child’s best interest.<sup>16</sup> New York should adopt principles akin to the Australian principles from the CYFA to further its goal of promoting and maintaining the children’s best interest in Family Court matters.

The best interest of the children principle is fully incorporated in Custody and Visitation (Article 6) proceedings.<sup>17</sup> For instance, subject children who testify do so in a private *in camera* setting, usually in a judge’s chambers, with only the judge, the Attorney for the Child, and a court reporter present.<sup>18</sup> The transcript of the testimony is sealed and only accessible by the presiding Family Court judge and the Appellate judge, upon appeal.<sup>19</sup> This procedure, known as a “true” *Lincoln* hearing, protects the children from the potential trauma of testifying in open court, especially with their parents present.<sup>20</sup> In addition, the sealing of the transcript ensures full confidentiality so the sensitive content of the children’s testimony will not be revealed.<sup>21</sup> These protections are in place to prevent the possibility of jeopardizing or further jeopardizing a parent, a child, or a parent-child relationship, which would be contrary to the child’s best-interest principle.

Abuse and Neglect (Article 10) proceedings, on the other hand, are not as rigid with respect to confidentiality and the best-interest-of-the-child protections.<sup>22</sup> Subject children testifying in Article 10 proceedings may testify in a *Lincoln* hearing setting, with some caveats, such as needing the consent of all parties to the litigation.<sup>23</sup> The attorney for each parent is permitted to be present and ask

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<sup>14</sup> CYFA, *supra* note 11, at ch 1 s 10 pt 1.2 div 2 para 2.

<sup>15</sup> CYFA, *supra* note 11, at ch 1 s 10 pt 1.2 div 2 para 3b.

<sup>16</sup> CYFA, *supra* note 11, at ch 1 s 10 pt 1.2 div. 2 para 3b.

<sup>17</sup> *Lincoln v. Lincoln*, 247 N.E.2d 659, 660 (N.Y. 1969).

<sup>18</sup> *Id.* at 661.

<sup>19</sup> CALLAGHAN’S FAMILY COURT LAW & PRACTICE § 4:12 (Westlaw 2016 ed. 2016) [hereinafter CALLAGHAN’S §4:12].

<sup>20</sup> *Id.*

<sup>21</sup> *Verry v. Verry*, 880 N.Y.S.2d 730, 731 (3d Dep’t 2009) (quoting *Matter of Hrusovsky v. Benjamin*, 710 N.Y.S.2d 198, 201 (3d Dep’t 2000)).

<sup>22</sup> CALLAGHAN’ § 4:12, *supra* note 19.

<sup>23</sup> *In re Justin C.*, 903 N.Y.S.2d, 806, 807 (3d Dep’t 2010).

questions while the children testify in chambers.<sup>24</sup> The transcript of the children's testimony during these proceedings is unsealed and can be accessed by both parties, eliminating the confidential nature seen in Article 6 proceedings.<sup>25</sup> These hearings are known as "modified" *Lincoln* hearings.<sup>26</sup> A rationale for removing full confidentiality in these hearings is to protect the parents' due process rights in abuse and neglect cases.<sup>27</sup> This would allow the parent to refute any allegations made against him or her in these proceedings.<sup>28</sup>

This argument has, in turn, persuaded the legislature and judges to allow for the softer confidentiality measures that have been utilized.<sup>29</sup> However, these softer confidentiality measures may have an adverse effect in protecting the best interest of the children, especially in achieving the goal of family reunification,<sup>30</sup> because of the "emotional fallout or retaliation that might ensue if their disclosures are revealed."<sup>31</sup> Because the best interests of the children should be at the forefront of both Article 6 and Article 10 proceedings, identical measures of confidentiality should be applied in both proceedings to truly maintain a child's best interest.

This Note will argue that true and modified *Lincoln* hearings should require identical confidentiality measures to protect the children and their best interests while within the four walls of Family Court for Article 6 and Article 10 proceedings. The matching confidentiality procedures would protect a child's best interest to the fullest, outside of the Family Court, leading to an easier transition for the custody and visitation arrangements in Article 6 proceedings and expediting the ultimate goal of family reunification in Article 10 proceedings.<sup>32</sup>

This Note will be divided into six sections. Section II of this Note will discuss the transitional history of constitutional protections guaranteed in criminal cases into civil proceedings. Specifically, it will discuss the recognition of constitutional due process protections for juveniles, the transition of viewing proceedings involving juveniles

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<sup>24</sup> CALLAGHAN'S § 4:12, *supra* note 19.

<sup>25</sup> CALLAGHAN'S § 4:12, *supra* note 19.

<sup>26</sup> CALLAGHAN'S § 4:12, *supra* note 19.

<sup>27</sup> *Justin C.*, 903 N.Y.S.2d at 809-10.

<sup>28</sup> *Id.* at 809-10.

<sup>29</sup> *Id.* at 806.

<sup>30</sup> *Sandra S. v. Abdul S.*, 914 N.Y.S.2d 858, 863 (Kings Cnty Fam. Ct. 2010).

<sup>31</sup> *Id.* at 859.

<sup>32</sup> *Sandra S.*, 914 N.Y.S.2d at 860, 861.

more as civil in nature, and the further expansion of constitutional protections in all civil cases. Section III will provide a discussion of the Family Court System in New York. This section will define the doctrine of *parens patriae*<sup>33</sup> by giving a brief background of the doctrine. It will also address the creation of the Family Court Act in New York, which will include a general overview of Article 6 and Article 10 proceedings of the Family Court Act. Section IV will analyze the procedures involved in *Lincoln* hearings with respect to Article 6 and Article 10 of the New York Family Court Act. Section V will argue that the full confidentiality utilized in true *Lincoln* hearings should also be applied in “modified” *Lincoln* hearings to protect the best interest of the child in both Article 6 and Article 10 proceedings, especially to achieve the ultimate goal of reunification of the family in Article 10 most efficiently. Lastly, Section VI will summarize the objective of this Note, which is for the Family Court to implement identical measures of confidentiality for the best interest of the child in Article 6 and Article 10 proceedings. Utilizing identical confidentiality measures would alleviate tension in custody and visitation arrangements in Article 6 proceedings and achieve reunification of the family in Article 10 proceedings.

## II. HISTORY OF HOW CRIMINAL DUE PROCESS MADE ITS WAY INTO CIVIL PROCEEDINGS.

It is well-settled law that, “Family Court Procedure is not governed by the Code of Criminal Procedure.”<sup>34</sup> In 1948, however, the United States Supreme Court case, *Haley v. State of Ohio*,<sup>35</sup> was pivotal in introducing criminal procedure with respect to due process of law to matters pertaining to juveniles.<sup>36</sup> Furthermore, *Haley* first recognized the necessity of criminal procedure in the juvenile arena by adopting constitutionally protected rights previously afforded only to adults.<sup>37</sup>

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<sup>33</sup> “Parent of one’s country.” This provides a Court with authority to intervene to safeguard individuals who are not able to do so on their own, especially children. LEGAL DICTIONARY, <https://legaldictionary.net/parens-patriae> (last visited Feb. 26, 2017).

<sup>34</sup> *In re D.*, 261 N.E.2d 627, 630 (N.Y. 1970).

<sup>35</sup> 332 U.S. 596 (1948).

<sup>36</sup> *Id.* at 599.

<sup>37</sup> *Id.* at 600, 601.

### A. The Beginnings of Constitutional Due Process Protections for Juvenile Offenders

In *Haley*, fifteen-year-old John Harvey Haley was allegedly serving as the lookout for two acquaintances that robbed and shot a candy storeowner.<sup>38</sup> He was arrested five days after this incident occurred.<sup>39</sup> Haley was convicted and sentenced to life in prison by the Trial Court in Ohio, for first-degree murder of the storeowner.<sup>40</sup> During Haley's arrest, police removed him from his house and took him into custody to question him at the police station.<sup>41</sup> The police, by five to six rotating officers, questioned Haley for approximately five hours, between the hours of midnight and 5:00 a.m., without any parent, attorney, or friend present.<sup>42</sup> At approximately 5:00 a.m., Haley confessed after being shown alleged confessions from his accomplices.<sup>43</sup> Neither Haley's mother nor the attorney Haley's mother retained to represent him was permitted to see Haley during the questioning.<sup>44</sup> Haley gave a written confession on a form in which the first line read, "We want to inform you of your constitutional rights, the law gives you the right to make this statement or not as you see fit."<sup>45</sup>

The *Haley* Court stated that the interrogation methods used to obtain Haley's confession did not conform to due process provided by the Fourteenth Amendment.<sup>46</sup> Further, the Court reasoned that, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."<sup>47</sup> In other words, the police utilized tactics on Haley, "a child by means which the law should not sanction,"<sup>48</sup> which would violate due process if utilized on a similarly situated adult, and thus, Haley's confession cannot stand as it was not given voluntarily.<sup>49</sup>

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<sup>38</sup> *Id.* at 597.

<sup>39</sup> *Id.*

<sup>40</sup> *Haley*, 332 U.S. at 597.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 598.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 600.

<sup>45</sup> *Haley*, 332 U.S. at 598.

<sup>46</sup> *Id.* at 599.

<sup>47</sup> *Id.* at 601.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Justice Frankfurter's concurring opinion averred, "I do not believe that even capital offenses by boys of fifteen should be dealt with according to the conventional criminal procedure."<sup>50</sup> In other words, Justice Frankfurter saw Haley as a vulnerable, helpless adolescent who was not capable of withstanding the interrogation methods that the police used against him like an adult could.<sup>51</sup> Justice Frankfurter proffered that a young individual like Haley would succumb to the stress during questioning and would be more likely to give an involuntary confession regardless of his true guilt or innocence in the matter.<sup>52</sup> Justice Frankfurter, along with the rest of the majority, explained that Haley's confession was not valid because of the lack of due process protections provided to Haley during the questioning.<sup>53</sup> Thus, the Court effectively recognized that children and adults alike must be afforded constitutional protections to avoid involuntary or coerced confessions.<sup>54</sup> Even though the Supreme Court recognized that it gives States the freedom to choose "their methods of criminal procedure,"<sup>55</sup> the methods chosen cannot be in "conflict with deeply rooted feelings of the community."<sup>56</sup> Therefore, the Court reversed Haley's conviction because of the lack of constitutional due process protections available to a teenager, like Haley, during a police interrogation.<sup>57</sup>

### **B. The Shift Towards Treating Juvenile Offender Proceedings as Civil Matters**

Juvenile delinquency proceedings after *Haley* started to be viewed as more "civil in nature and not criminal"<sup>58</sup> because of the Juvenile Court's role as a parental figure or guardian to act in the best interest of the children in its jurisdiction.<sup>59</sup> Accordingly, juvenile courts are expected to act in the best interest of the children and should

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<sup>50</sup> *Haley*, 332 U.S. at 602-03 (Frankfurter, J., concurring).

<sup>51</sup> *Id.* at 603, 604.

<sup>52</sup> *Id.* at 603.

<sup>53</sup> *Id.* at 604-05.

<sup>54</sup> *Id.* at 601.

<sup>55</sup> *Haley*, 332 U.S. at 604.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 601.

<sup>58</sup> *Kent v. United States*, 383 U.S. 541, 555 (1966).

<sup>59</sup> Also known as the doctrine of *parens patriae*. LEGAL DICTIONARY, *supra* note 33; *see also Kent*, 383 U.S. at 554-55.



not simply “adjudicat[e] criminal conduct.”<sup>60</sup> However, the same procedures should apply in the juvenile courts, as in adult criminal courts, to ensure “due process and fair treatment for juveniles.”<sup>61</sup>

In *Kent v. United States*,<sup>62</sup> fourteen-year-old Morris A. Kent, Jr., was apprehended for a series of residential break-ins and attempted thefts of handbags.<sup>63</sup> The Juvenile Court placed Kent on probation.<sup>64</sup> Two years later, Kent (age sixteen), went into a woman’s residence in the District of Columbia, stole her wallet and raped her.<sup>65</sup> These offenses, while Kent was still on probation, consequently placed Kent under the exclusive jurisdiction of the Juvenile Court.<sup>66</sup> However, the Juvenile Court judge waived jurisdiction, without having conducted a full investigation.<sup>67</sup> In addition, the judge denied Kent’s counsel access to Kent’s social service file, which Kent’s counsel argued was vital in providing Kent “with effective assistance of counsel.”<sup>68</sup> Ultimately, the judge turned Kent over to the District Court for the District of Columbia, an adult criminal court.<sup>69</sup>

Pursuant to the waiver provision of the District of Columbia Juvenile Court Act, a “Petitioner [wa]s entitled to a hearing, including access by his counsel to the social records and probation or similar reports, which presumably are considered by the court, and to a statement of reasons for the Juvenile Court’s decision.”<sup>70</sup> The Court reasoned that these statutory requirements, which invoke “constitutional principles relating to due process and the assistance of counsel,”<sup>71</sup> are necessary. Furthermore, the hearing Kent was entitled to does not have to include all criminal procedures expected in criminal trials, but “must measure up to the essentials of due process and fair treatment.”<sup>72</sup> The Court acknowledged that attorneys “have a legitimate interest in the protection of the child,”<sup>73</sup> and the denial of

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<sup>60</sup> *Kent*, 383 U.S. at 554.

<sup>61</sup> *Id.* at 562.

<sup>62</sup> 383 U.S. 541 (1966).

<sup>63</sup> *Id.* at 543.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Kent*, 383 U.S. at 546.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 557.

<sup>71</sup> *Id.*

<sup>72</sup> *Kent*, 383 U.S. at 562.

<sup>73</sup> *Id.* at 546, 563.

access to a juvenile's social service report and/or record is an impediment to the effective assistance of legal counsel for a juvenile.<sup>74</sup>

The emphasis on due process for juvenile delinquents, specifically in New York, came into focus in the 1966 Court of Appeals case, *In re W. & S.*<sup>75</sup> In *In re W.*, twelve-year-old Gregory W. was taken into custody at approximately 5:30 p.m. for questioning following a brutal assault in Brooklyn two weeks earlier.<sup>76</sup> Gregory confessed to the assault after being questioned until approximately five or six the following morning.<sup>77</sup> Throughout the questioning, Gregory had very little sleep, did not have a lawyer, nor were his parents present.<sup>78</sup> However, after Gregory was placed in Youth House,<sup>79</sup> the interrogating police officer was informed that Gregory was confined in the Kings County Hospital security ward at the time of the crime Gregory confessed to committing.<sup>80</sup> Gregory was then questioned by police, again without an attorney, about a possible escape from the hospital; he initially denied escaping, but ultimately confessed.<sup>81</sup>

During the trial in Family Court, Gregory's treating psychiatrist at the hospital testified.<sup>82</sup> Her testimony revealed that Gregory was a schizophrenic and his diagnosis "[w]ouldn't keep [Gregory] from admitting to whatever he thought was expected so that he could get out of the immediate situation."<sup>83</sup> This court held that Gregory, a "12-year-old mentally disturbed child detained in custody for 24 hours with little or no sleep,"<sup>84</sup> provided a coerced confession without proper due process protections; thus, Gregory's confession given under these circumstances cannot be valid.<sup>85</sup> Moreover, this court recognized that juvenile delinquency proceedings are "quasi-

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<sup>74</sup> *Id.*

<sup>75</sup> 224 N.E.2d 102 (N.Y. 1966).

<sup>76</sup> *Id.* at 103.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 104, 105.

<sup>79</sup> Robert Daley, *Youth House Acts to Drop Jail Aura*, N.Y. TIMES, (Oct. 2 1964), <http://www.nytimes.com/1964/10/02/youth-house-acts-to-drop-jail-aura.html> ("Youth House, a private agency financed by city and state funds, holds juvenile offenders after arrest under the jurisdiction of the Family Court. It is responsible for keeping the offender out of further trouble, and for seeing that he gets back in court for his hearing.").

<sup>80</sup> *In re W.*, 224 N.E.2d at 104.

<sup>81</sup> *Id.* at 105.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 102.

<sup>85</sup> *In re W.*, 224 N.E.2d at 102.

criminal in nature,”<sup>86</sup> because of the potential “loss of personal freedom.”<sup>87</sup> The court reinforced a legislative committee report, which provided that, “Any commitment—whether ‘civil’ or ‘criminal’, whether assertedly for ‘punitive’ or ‘rehabilitative’ purposes—involves a grave interference with personal liberty.”<sup>88</sup> Therefore, it follows that a litigant, whose personal liberties are at stake, is entitled to constitutional safeguards regardless of whether the proceeding is criminal or civil in nature.

### C. Greater Expansion of Constitutional Protections in All Civil Proceedings

In 1967, after *In re W.*, due process safeguards for juvenile delinquents were expanded following the United States Supreme Court case, *In re Gault*.<sup>89</sup> In *Gault*, fifteen-year-old Gerald Gault made vulgar statements to a neighbor over the phone, and was subsequently taken into custody.<sup>90</sup> The Arizona Juvenile Court consequently committed Gerald to the State Industrial School as a juvenile delinquent.<sup>91</sup> The Court in *Gault* described the confinement of Gerald in the Industrial School as an incarceration, and therefore, a restraint on his freedom.<sup>92</sup> The Court stated that, if Gerald were over eighteen years old at the time of this offense, the sentence would carry a fine and jail time, with a full gamut of constitutional protections guaranteed to him throughout such a proceeding.<sup>93</sup> The Court followed its reasoning from *Kent* by acknowledging the necessity for constitutional due process in civil juvenile delinquency proceedings.<sup>94</sup> *Gault* held that due process and fair treatment in juvenile delinquency proceedings

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<sup>86</sup> *Id.* at 106.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 106 (quoting Report of Joint Legislative Committee on Court Reorganization, Jan. 30, 1962, at 8.).

<sup>89</sup> 387 U.S. 1 (1967).

<sup>90</sup> *Id.* at 4. Gerald was on probation for the theft of a wallet several months prior to this incident. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 27.

<sup>93</sup> *Id.* at 29. Specifically, “The United States Constitution would guarantee him rights and protections with respect to arrest, search, and seizure, and pretrial interrogation.” *Gault*, 387 U.S. at 29.

<sup>94</sup> *Id.* at 30-31; see also *In re Winship*, 397 U.S. 358, 365-66 (1970) (“Civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.”).

include a juvenile's "right to notice of charges, to counsel, to confrontation and cross-examination of witnesses and to [the] privilege against self-incrimination."<sup>95</sup>

The *Gault* Court emphasized that "fair, efficient and effective procedures"<sup>96</sup> are of great import to avoid "inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy."<sup>97</sup> These procedures, according to the Court, "are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present."<sup>98</sup> Further, the truth is more likely to surface when a party has the ability to confront the other about his version of the disputed incident.<sup>99</sup> In other words, due process procedural safeguards are necessary to uncover the truth or discover the fallacies by having the opportunity to either corroborate statements presented in court or to refute the statements.<sup>100</sup> Thus, because of the adversarial nature of a civil juvenile delinquent proceeding, it follows that all parties in such a matter must be given equal due process protections, whether an individual is a juvenile or an adult.

Although due process in Family Court proceedings is required to ensure fairness, a subject child's interests must always be fully protected, first and foremost. *People ex rel. Fields v. Kaufmann*<sup>101</sup> recognized that the State, in its role as *parens patriae*, is allowed to deviate from "strict adversary concepts" to maintain the "paramount

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<sup>95</sup> *Gault*, 387 U.S. at 2.

<sup>96</sup> *Id.* at 18.

<sup>97</sup> *Id.* at 20.

<sup>98</sup> *Id.* at 21.

<sup>99</sup> *Id.*

<sup>100</sup> *Gault*, 387 U.S. at 21 (The Court opined that the mechanisms of due process assist in uncovering the veracity of information provided in a given proceeding, especially the ability to confront contradictory submissions.); see *People ex rel. Fields v. Kaufmann*, 193 N.Y.S.2d 789, 789 (1st Dep't 1959). A family unit counselor as well as several mental health professionals submitted confidential reports to a Family Court judge to determine which parent would be awarded custody of the two subject children. *Id.* at 791. The trial court judge made his determination for custody based on the record of the earlier Habeas Corpus hearing and the confidential reports, which were not part of the record, nor were these reports made available to the parents' attorneys. *Id.* at 789. The Appellate Court concluded that the trial court's custody ruling was not proper based on the record lacking information from the confidential reports, which would have allowed the parties to further inquire about the content of said reports. *Id.* at 791. The Appellate court further stated, "the contents may provide the source for the examination of the parties and witnesses by the Court and enable counsel to fully dissect any disputed facts." *Fields*, 193 N.Y.S.2d at 793.

<sup>101</sup> 193 N.Y.S.2d 789, 789 (1st Dep't 1959).

welfare” of the child, which should trump the rights of the parents.<sup>102</sup> The due process protections now recognized in civil juvenile proceedings may and should be diminished if they conflict with the best-interest-of-the-child principles that the Family Court should always maintain as the top priority.

### III. THE FAMILY COURT SYSTEM IN NEW YORK

#### A. The Doctrine of *Parens Patriae*

*Parens patriae* is defined as “parent of the country,”<sup>103</sup> and allows a State “to protect persons who are legally unable to act on their own behalf.”<sup>104</sup> Specifically, in the United States, this has historically encompassed “children, mentally ill persons, and other individuals who are legally incompetent to manage their affairs.”<sup>105</sup> This doctrine can be traced as far back as the old English common law system.<sup>106</sup> Underlying this doctrine is the principle that a State, through its judges, is obligated to “act as a superparent” to persons with a legal disability.<sup>107</sup> Intertwined in the *parens patriae* doctrine is the best-interests-of-the-individual principle, which imposes a duty on a State to act “for the protection of the individual and then only in his or her best interests.”<sup>108</sup> In Family Court especially, “the court has a duty to insure that the best interests of children who have been placed in its care are safeguarded.”<sup>109</sup> To accomplish this, a Court may be obligated to interject to protect a child’s best interest when necessary.<sup>110</sup>

#### B. Creation of the Family Court Act in New York

In New York, the Family Court Act,<sup>111</sup> which established the Family Court itself, was implemented in 1962, and designed to handle

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<sup>102</sup> *Id.* at 792.

<sup>103</sup> THE FREE DICTIONARY, LEGAL-DICTIONARY, by Farlex, Inc., <http://legal-dictionary.thefreedictionary.com/parens+patriae> (last visited Mar. 6, 2017).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Matter of Female S.*, 444 N.Y.S.2d 829, 831 (N.Y. County 1981).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 832.

<sup>110</sup> LEGAL DICTIONARY, *supra* note 33.

<sup>111</sup> N.Y. FAM. CT. ACT (Westlaw through 2017).

all “familial dysfunction” within any given family.<sup>112</sup> In addition, the New York Family Court “was created to be a special agency for the care and protection of the young and the preservation of the family.”<sup>113</sup> Full-time Law Professor at the Elisabeth Haub School of Law, Pace University, Professor Merrill Sobie, dedicates his professional studies to children’s law and family law.<sup>114</sup> Professor Sobie “published the official *McKinney’s Commentaries to the Family Court Act* and the *Domestic Relations Law*.”<sup>115</sup>

In his *Practice Commentaries on the Family Court Act*, Professor Sobie provided that the “Family Court Act incorporates largely substantive provisions, and only relatively skeletal procedural framework.”<sup>116</sup> Professor Sobie proffered that the vernacular used to describe the parties in Family Court proceedings “may seem to be a superficial artifice designed to escape the quasi-criminal aspect of some of the Court’s work.”<sup>117</sup> Moreover, Professor Sobie recognized the “quasi-criminal” content heard in Family Court, but acknowledged the minimal procedural posture of the Family Court.<sup>118</sup> Therefore, procedure in Family Court is flexible and not as strict as true criminal matters heard in criminal courts.<sup>119</sup> Despite the “skeletal procedural framework,” Professor Sobie acknowledged that provisions of the Criminal Procedure Law do apply in juvenile cases.<sup>120</sup> The adversarial nature in criminal matters is also prevalent in juvenile matters, particularly when dissolved couples with children are the litigants and they have competing interests. The children’s best interest, however, should remain the top priority, despite the adversarial nature of these proceedings.<sup>121</sup>

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<sup>112</sup> Merrill Sobie, *Practice Commentaries*, McKinney’s Cons Laws of N.Y. Book 29A, FAM. CT. ACT § 111 (Westlaw through 2017, ch. 1-7) [hereinafter Sobie, *Practice Commentaries* § 111].

<sup>113</sup> *Matter of Female S.*, 44 N.Y.S.2d at 832 (quoting 1962 Report of Joint Legislative Committee on court reorganization No. 2 F.C.A. Committee Comments at 2).

<sup>114</sup> ELISABETH HAUB SCHOOL OF LAW PACE UNIVERSITY, <http://law.pace.edu/faculty/merril-sobie> (last visited Feb. 25, 2017).

<sup>115</sup> *Id.* In addition, Professor Sobie has authored and co-authored a plethora of books, articles, studies, codes and commentaries all related to children’s and family law. *Id.*

<sup>116</sup> Sobie, *Practice Commentaries* § 111, *supra* note 112.

<sup>117</sup> Sobie, *Practice Commentaries* § 111, *supra* note 112.

<sup>118</sup> Sobie, *Practice Commentaries* § 111, *supra* note 112.

<sup>119</sup> Sobie, *Practice Commentaries* § 111, *supra* note 112.

<sup>120</sup> Sobie, *Practice Commentaries* § 111, *supra* note 112.

<sup>121</sup> Sobie, *Practice Commentaries* § 111, *supra* note 112.

### C. Article 6 of the Family Court Act

Section 651 of the Family Court Act provides the “Jurisdiction over habeas corpus proceedings and petitions for custody and visitation of minors.”<sup>122</sup> Section 651 obtains its jurisdictional authority from “Article 6, Section 13 of the New York State Constitution,”<sup>123</sup> which provides, in relevant part, “The family court shall have jurisdiction . . . over the custody of minors except for custody incidental to actions and proceedings for marital separation, divorce, annulment or marriage and dissolution of marriage.”<sup>124</sup> Professor Sobie proffered that this “[s]ection is devoid of substantive or procedural rules,”<sup>125</sup> and simply offers a broad best interests of the child standard for general custody and visitation proceedings.<sup>126</sup> Although best interest of the child has never been explicitly defined, it often involves various factors a judge must assess with respect to what and who would be around the child during his/her temporary placement.<sup>127</sup> In New York specifically, a judge is required to make his custody and visitation determination based on what will be best for the child’s health and safety.<sup>128</sup> The only guidance on how to uphold this standard in custody and visitation proceedings is through common law, as there are no explicit procedural framework guidelines provided in the Family Court Act.<sup>129</sup>

### D. Article 10 of the Family Court Act

Article 10 of the Family Court Act covers Child Protective Proceedings.<sup>130</sup> Specifically, as stated in Section 1011, the purpose “is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being.”<sup>131</sup> In addition, due process in Section 1011

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<sup>122</sup> N.Y. FAM. CT. ACT § 651 (West, Westlaw through L.2017, ch. 1-7).

<sup>123</sup> Merrill Sobie, Practice Commentaries, McKinney’s Cons. Laws of N.Y. Book 29A, FAM. CT. ACT § 651 (Westlaw through 2017, ch. 1-7) [hereinafter Sobie, *Section 651*].

<sup>124</sup> N.Y. CONST. art. 6, §13(b).

<sup>125</sup> Sobie, *Section 651*, *supra* note 123.

<sup>126</sup> Sobie, *Section 651*, *supra* note 123.

<sup>127</sup> NEW YORK STATE UNIFIED COURT SYSTEM, <https://www.nycourts.gov/courthelp/family/bestInterest.shtml> (last visited Jan. 12, 2017).

<sup>128</sup> *Id.*

<sup>129</sup> Sobie, *Section 651*, *supra* note 123.

<sup>130</sup> N.Y. FAM. CT. ACT, Art. 10 (West, Westlaw through L.2017, ch. 1-7).

<sup>131</sup> N.Y. FAM. CT. ACT § 1011 (West, Westlaw through L.2017, ch. 1-7).

provides that there might be instances when the Family Court may be required to intervene and advocate for a child's needs, even if a child's needs conflict with the desires of a parent.<sup>132</sup> Professor Sobie acknowledged the lack of due process procedures contained in Article 10, but avers that a State's intervention against a parent's wishes for her child "must be based on a due process of law."<sup>133</sup> Section 1011 stresses the importance of protecting the child, and Professor Sobie agrees with this premise.<sup>134</sup> Nevertheless, Family Court *Lincoln* procedures in Article 6 and Article 10 proceedings vary drastically with respect to maintaining the best interests of the child.

#### IV. "TRUE" VS. "MODIFIED" *LINCOLN* HEARINGS

Despite the often-criticized lackadaisical Family Court structure, profound, albeit conflicting, procedures are in place with respect to subject children testifying.<sup>135</sup> Custody and Visitation proceedings pursuant to Article 6 utilize an interview method called a "true" *Lincoln* hearing, which provides full privacy and confidentiality for the subject children testifying.<sup>136</sup> Conversely, "modified" *Lincoln* hearings in Abuse and Neglect proceedings pursuant to Article 10 do not offer the same levels of privacy and confidentiality to the subject children who are testifying.<sup>137</sup> Family Court is expected to operate under a best-interest-of-the-child jurisprudence, but it seems to do so selectively and problematically.<sup>138</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> Merrill Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 29A, FAM. CT. ACT § 1011 (Westlaw through 2017, ch. 1-7) [hereinafter Sobie, *Section 1011*]; see U.S. CONST. amend. XIV ("Nor shall any State deprive any person of life, liberty or property, without due process of law."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Stanley v. State of Illinois*, 405 U.S. 645, 651 (1972) (A parent has a fundamental right and interest in the "companionship, care, custody and management of his or her children"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

<sup>134</sup> Sobie, *Section 1011*, *supra* note 133.

<sup>135</sup> CALLAGHAN'S § 4:12, *supra* note 19.

<sup>136</sup> CALLAGHAN'S § 4:12, *supra* note 19.

<sup>137</sup> CALLAGHAN'S § 4:12, *supra* note 19.

<sup>138</sup> This is the author's opinion on the inconsistent *Lincoln* procedure used in Article 6 vs. Article 10 proceedings with respect to the privacy of the hearing and the confidentiality of the hearing transcripts.



In Custody and Visitation (Article 6) proceedings, the best-interest-of-the-child jurisprudential approach is best exemplified in the New York Court of Appeals seminal case, *Lincoln v Lincoln*.<sup>139</sup> *Lincoln* involved a custody dispute between divorced parents.<sup>140</sup> The Court was cognizant that the subject children's "interests are paramount"<sup>141</sup> and the "rights of their parents must, in the case of conflict, yield to that superior demand."<sup>142</sup> The Court also recognized that "limited modifications of the traditional requirements of the adversary system must be made, if necessary,"<sup>143</sup> in custody proceedings, so long as it is for the benefit of the child.<sup>144</sup>

To preserve the children's best interest, the *Lincoln* Court permitted a private interview with the subject children without the parents or the parents' counsel present.<sup>145</sup> The Court, in dicta, proffered that, "It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them,"<sup>146</sup> as well as, placing the children in the precarious position of having to "openly choose between them."<sup>147</sup> The Court ultimately concluded that private interviews are more likely to elicit accurate depictions from a child, while reducing the psychological harms to a child, than if a child was to testify in the conventional manner of open court.<sup>148</sup> Particularly, children will be more inclined to "speak freely and candidly concerning their preferences,"<sup>149</sup> regarding their parents and the children's "confidences would be respected,"<sup>150</sup> by not disclosing the testimony offered during the private interview.<sup>151</sup>

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<sup>139</sup> 247 N.E.2d 659 (N.Y. 1969).

<sup>140</sup> *Id.* at 660.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Lincoln*, 247 N.E.2d at 660.

<sup>145</sup> *Id.* at 661.

<sup>146</sup> *Id.* at 660.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Lincoln*, 247 N.E.2d at 661.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

Following the decision in *Lincoln*, these private *in-camera* interviews between the children, the Attorney for the Child and the presiding judge were subsequently referred to as *Lincoln* hearings.<sup>152</sup> A “true” *Lincoln* hearing can be held during or after a fact-finding hearing because it is a tool used to corroborate any evidence introduced during an Article 6 fact-finding hearing.<sup>153</sup> “True” *Lincoln* hearings are conducted at the court’s discretion where it will be useful in providing a court with insight into the subject children’s best interests.<sup>154</sup>

In determining whether a *Lincoln* hearing will be in the children’s best interest, a court will typically look at the age of the children, in addition to testimony made by others regarding the wishes of the subject children.<sup>155</sup> With regard to a judge’s decision to conduct a *Lincoln* hearing, one court proffered that, “These considerations apply with equal force to children of all ages; indeed, it may be particularly important to ensure that older children have the opportunity to express their views in confidence, as their preferences are given great weight in custody proceedings.”<sup>156</sup> Furthermore, sealing the hearing transcript and not releasing it to the parents or the parents’ counsel preserves the confidentiality of a “true” *Lincoln* hearing.<sup>157</sup> This procedure is utilized to limit a parent’s access to the transcript or its contents, and thus, not exposing a child to the potential harm that could result from a parent finding out what his child said to the judge.<sup>158</sup>

Subsequent to *Lincoln*, Family Courts also began conducting “modified” *Lincoln* hearings in Article 10 proceedings.<sup>159</sup> These “modified” *Lincoln* hearings loosened the tight confidentiality reigns afforded in “true” *Lincoln* hearings,<sup>160</sup> in which the child may incur more harm than benefit.<sup>161</sup> A quintessential case describing a “modified” *Lincoln* hearing is *In re Justin C.*<sup>162</sup> In *Justin C.*, Petitioner

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<sup>152</sup> CALLAGHAN’s § 4:12, *supra* note 19.

<sup>153</sup> *Spencer v. Spencer*, 925 N.Y.S.2d 227, 229 (3d Dep’t 2011).

<sup>154</sup> *Angela F. v. Gail W.*, 879 N.Y.S.2d 426, 428 (3d Dep’t 2014).

<sup>155</sup> *Id.*

<sup>156</sup> *Battin v. Battin*, 12 N.Y.S.3d 672, 673 (3d Dep’t 2015).

<sup>157</sup> *Cohen v. Cohen*, 993 N.Y.S.2d 4, 8 (1st Dep’t 2014).

<sup>158</sup> *Sandra S.*, 914 N.Y.S.2d at 859.

<sup>159</sup> CALLAGHAN’s § 4:12, *supra* note 19.

<sup>160</sup> CALLAGHAN’s § 4:12, *supra* note 19.

<sup>161</sup> *Sandra S.*, 914 N.Y.S.2d at 859.

<sup>162</sup> 903 N.Y.S.2d 806.

alleged that the Respondents utilized corporal punishment on her children and the father “had sexual intercourse with the daughter on at least 20 occasions.”<sup>163</sup> The attorney for the subject daughter requested a “modified” *Lincoln* hearing, before the start of the fact-finding hearing to occur “in the presence of all counsel, but outside the presence of respondents,”<sup>164</sup> with respondents’ attorneys having full permission to cross-examine the daughter.<sup>165</sup>

The subject daughter in *Justin C.* gave sworn testimony in front of all counsel, the judge and a court stenographer, who compiled a written transcript of the “modified” *Lincoln* hearing testimony.<sup>166</sup> The Family Court sealed the daughter’s testimony transcript and marked it as confidential prior to sending it to the Appellate Division, Third Department, after the father appealed the finding of abuse and neglect by the Family Court.<sup>167</sup> Father’s appellate counsel moved to unseal the “modified” *Lincoln* hearing transcript asserting that the transcript was necessary, “to reference and make fact-specific arguments based upon that testimony.”<sup>168</sup> Father’s appellate counsel argued that allowing the transcript to be left sealed “hampered her ability to adequately represent the father on appeal.”<sup>169</sup> This motion was denied, but was appealed again to the Third Department, which ultimately vacated its prior decision and granted the father’s motion to unseal the transcript of the daughter’s “modified” *Lincoln* hearing.<sup>170</sup> The *Justin C.* court reasoned that it is baseless to extend the same confidentiality safeguards to children in abuse and neglect cases as they are afforded in custody proceedings.<sup>171</sup>

This court held that the testimony transcript of a child during an Article 10 proceeding, conducted in front of all counsel, with

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<sup>163</sup> *Id.* at 807.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Justin C.*, 903 N.Y.S.2d at 807.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 808 (“While the issue at the fact-finding stage of a custody proceeding is what custodial arrangement is in the best interest of the child, the issue at the fact-finding stage of a Family Ct. Act article 10 proceeding is whether the petitioner has proved by a preponderance of the evidence that the child is neglected and/or abused and that the respondent is responsible for the neglect and/or abuse. Most significantly, unlike a custody proceeding, the position of the allegedly neglected or abused child in an article 10 proceeding may be adverse to the respondent.”).

counsel having the opportunity to cross-examine the child, “may not be sealed,”<sup>172</sup> because of the “fundamental due process concerns for the purposes of an appeal.”<sup>173</sup> Having access to the child’s *in camera* testimony affords the respondents’ counsel an opportunity to confirm or discredit the statements made by the child.<sup>174</sup> Parents accused of abuse or neglect invoke due process concerns because these accusations could result in a limitation on their constitutionally protected rights in the “companionship, care, custody and management”<sup>175</sup> of their children.<sup>176</sup> Thus, natural parents’ protected rights with respect to their children do not completely fall by the wayside as some due process is afforded to them in abuse and neglect proceedings.<sup>177</sup>

However, this rationale is contrary to the best-interest-of-the-children approach governing Family Court in Article 6 and Article 10 proceedings. Providing parents with access to their children’s private interview transcripts can create significantly more turmoil within the family.<sup>178</sup> Parents with access to the *Lincoln* hearing transcript would be free to show anyone (other family members, friends, etc.) they want what their children said about them.<sup>179</sup> It is possible that the family member or friend and even the parent would view the children in a negative light after having exposed what the children actually said

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<sup>172</sup> *Justin C.*, 903 N.Y.S.2d at 810.

<sup>173</sup> *Id.* at 809.

<sup>174</sup> *Sandra S.*, 914 N.Y.S.2d at 862.

<sup>175</sup> *Stanley*, 405 U.S. 645 at 651.

<sup>176</sup> *Sandra S.*, 914 N.Y.S.2d at 862.

<sup>177</sup> *See In re B.*, 285 N.E.2d 288, 290 (1972). The New York Court of Appeals reasoned that when a proceeding involves a natural parent’s constitutionally recognized interests in his child, a parent is entitled to due process, fundamental fairness and equal protection safeguards in the form of a “meaningful opportunity to be heard,” with the assistance of appointed legal counsel. *Id.* at 290. The court further acknowledged the necessity for legal counsel in proceedings, which could result in a natural parent losing “a child’s society . . . ,” and becoming a ward of the State, by reasoning that counsel aid in closing the gap between the state and pro se litigants with respect to the “inherent imbalance of experience and expertise.” *Id.* Providing an indigent parent with counsel insulates a parent from being blind-sided by an unfair proceeding lacking due process. *Id.* A lay parent may not have the expectations of due process and fairness in proceedings like an experienced attorney would have, so it is essential for a parent to be afforded legal assistance; *see* N.Y. FAM. CT. ACT § 261 (West, Westlaw through L.2017, ch. 1-7) (“Counsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition.”).

<sup>178</sup> *Sandra S.*, 914 N.Y.S.2d at 863.

<sup>179</sup> *Id.* at 862, 863.

about that parent further damaging the relationship.<sup>180</sup> To guarantee no further damage to an already strained parent-children relationship, as well as to the children as individuals, sealing the *Lincoln* hearing transcript as is required in Article 6 proceedings is the best practice.<sup>181</sup> This practice should take priority over the competing parents' due process concerns to uphold the best-interest-of-the-child foundation that Family Court is built on.

#### V. THE SAME *LINCOLN* PROCEDURES ARE NEEDED IN ARTICLE 6 AND ARTICLE 10 PROCEEDINGS

The competing interests of the children's best interest and the parents' due process rights between Article 6 and Article 10 proceedings result in conflicting *Lincoln* procedures. According to Section 2:84 of the New York Practice Series—New York Family Court Practice,<sup>182</sup> the constitutional right to confront one's accuser afforded to defendants in criminal matters is not applicable in Family Court Article 10 proceedings.<sup>183</sup> However, the Family Court permits respondent's counsel to cross-examine the child witness without the respondent parent present.<sup>184</sup> The Family Court seeks to "protect a vulnerable child witness,"<sup>185</sup> and accomplishes this by eliminating the child's face-to-face confrontation with the respondent parent by using modified *Lincoln* procedure.<sup>186</sup> In fact, in *Maryland v. Craig*,<sup>187</sup> the United States Supreme Court opined that a "State's interest in the psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."<sup>188</sup> Disputes involving children and their parents take the most significant toll on the children; thus, it is vital that the children be afforded the greatest protection possible.<sup>189</sup>

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<sup>180</sup> *Id.* at 863.

<sup>181</sup> *Sellen v. Wright*, 645 N.Y.S.2d 346, 348 (3d Dep't 1996).

<sup>182</sup> 10 MERRIL SOBIE & GARY S. SOLOMON, NEW YORK PRACTICE SERIES – NEW YORK FAMILY COURT PRACTICE § 2:84 (Westlaw 2017 2d ed.) [hereinafter Sobie, *Family Court Practice*].

<sup>183</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>184</sup> CALLAGHAN'S § 4:12, *supra* note 19.

<sup>185</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>186</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>187</sup> 497 U.S. 836 (1990).

<sup>188</sup> *Id.* at 853.

<sup>189</sup> *Sandra S.*, 914 N.Y.S.2d at 863.

At the same time, Section 2:84 also acknowledges that “excluding a respondent and his or her attorney becomes more problematical when a child witness’s testimony constitutes both the first detailed airing of the facts and the core of the petitioner’s case.”<sup>190</sup> In addition, Section 2:84 states that the respondent is not provided with an opportunity to rebut this evidence when *Lincoln* procedure is used.<sup>191</sup> Not having the opportunity to dispute the petitioner’s evidence is especially prevalent if a judge’s finding is predicated only on unsworn testimony.<sup>192</sup> Generally, a balancing test is applied to “weigh the importance of face-to-face confrontation and the potential prejudice to the respondent’s right to a fair hearing against the risk of harm to the child.”<sup>193</sup> The inconsistencies in the *Lincoln* hearing procedures utilized in Article 6 and Article 10 proceedings need to be reconciled.

The *Lincoln* hearings in Article 6 proceedings are tools used to “corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing.”<sup>194</sup> On the other hand, these “modified” *Lincoln* hearings utilized in Article 10 proceedings assist in proving “by a preponderance of the evidence that the child is neglected and/or abused and that the respondent is responsible for the neglect and/or abuse.”<sup>195</sup> Article 10 proceedings appear to be more adversarial in nature.<sup>196</sup> In addition, Section 1046 of the Family Court Act of New York<sup>197</sup> provides an exception to the hearsay rule of evidence, which admits a child’s prior hearsay statements into evidence.<sup>198</sup> However, a child’s uncorroborated hearsay statements alone are insufficient to find abuse or neglect at fact-finding.<sup>199</sup>

These allegations of abuse or neglect asserted against one party provide that fairness in procedure and due process offers the accused

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<sup>190</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>191</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>192</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>193</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>194</sup> *Spencer*, 925 N.Y.S.2d at 229.

<sup>195</sup> *Justin C.*, 903 N.Y.S.2d at 808.

<sup>196</sup> *Id.* at 810.

<sup>197</sup> N.Y. FAM. CT. ACT § 1046 (Westlaw through L.2017, ch. 1-8).

<sup>198</sup> Merril Sobie, Practice Commentaries, McKinney’s Cons. Laws of N.Y. Book 29A, FAM. CT. ACT § 1011 (Westlaw through 2017, ch. 1-7).

<sup>199</sup> § 1046(a)(vi) (Westlaw).

party, through counsel, an opportunity to discredit the allegations.<sup>200</sup> In effect, the judge will then have the opportunity to determine whether the testimony has been sufficiently corroborated for a finding to be made.<sup>201</sup> However, sufficient corroboration of a child's hearsay statement can be accomplished through respondent's counsel having "an opportunity to submit questions to be posed by the judge,"<sup>202</sup> through expert testimony,<sup>203</sup> other third party testimony,<sup>204</sup> or through the child's own *in camera* testimony.<sup>205</sup>

In *Matter of Nicole V.*,<sup>206</sup> the court concluded that, "[D]ue process requirements are met by permitting a finding of abuse to be made on the basis of a child's out-of-court statement which is corroborated by any competent, non-hearsay, relevant evidence which . . . enhances the credibility of the child's statements as to its material elements."<sup>207</sup> Furthermore, "any other evidence tending to support the reliability of the previous statements,"<sup>208</sup> such as any "writing, record or photograph . . . made as a memorandum or record of any . . . event relating to . . . abuse or neglect,"<sup>209</sup> is sufficient to corroborate a child's hearsay statements.<sup>210</sup> At the same time, the "testimony of the child shall not be necessary to make a fact-finding of abuse or neglect,"<sup>211</sup> and corroboration is only required as evidence to the credibility of a child's hearsay statement.<sup>212</sup> The court in *Nicole V.*

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<sup>200</sup> *Sandra S.*, 914 N.Y.S.2d at 862.

<sup>201</sup> *Id.* at 862-63.

<sup>202</sup> Sobie, *Family Court Practice*, *supra* note 182.

<sup>203</sup> *Matter of Victoria K.*, 650 N.Y.S.2d 390, 391-92 (3d Dep't 1996) ("The therapist, who is a specialist in the field of child sexual abuse cases, testified that in her opinion, based on her interviews with the child and respondent, sexual abuse had occurred. She testified that the child was spontaneous in her statements, suggesting that they were not rehearsed, and that the specific and consistent sexual detail that the child was able to articulate was strong evidence to support the child's allegations.").

<sup>204</sup> *In re Sabrina M.*, 775 N.Y.S.2d 96, 98 (3d Dep't 2004) ("Sabrina's out-of-court oral and written statements were corroborated in key respects by the mother's testimony, as well as the testimony of third parties regarding hearsay statements made by Ashley, the mother and respondent.").

<sup>205</sup> *In re Aaliyah B.*, 892 N.Y.S.2d 242, 243 (3d Dep't 2009) ("Here, the child's allegations of the sexual abuse were sufficiently corroborated by her sworn in-camera testimony detailing certain incidents of when, where and how the sexual abuse occurred.").

<sup>206</sup> 510 N.Y.S.2d 567 (1st Dep't 1987), *aff'd*, 71 N.Y.2d 112 (1987).

<sup>207</sup> *Id.* at 572-73.

<sup>208</sup> § 1046(a)(vi) (Westlaw).

<sup>209</sup> *Id.* § 1046 (a)(iv).

<sup>210</sup> *Id.* § 1046 (a)(vi).

<sup>211</sup> *Id.*

<sup>212</sup> *Matter of Nicole V.*, 510 N.Y.S.2d at 571.

proffered that the principal objective in Article 10 proceedings is to prevent further harm to physically and emotionally abused or neglected child victims.<sup>213</sup> Because a child is not required to testify in Article 10 proceedings, assurances of full confidentiality protections should be given to incentivize a child if he or she so chooses to testify.<sup>214</sup> Continuing to utilize the current “modified” *Lincoln* procedure in Article 10 proceedings is contrary to the objectives of protecting a child from further damage.<sup>215</sup> The rights of parents should be secondary and outweighed by the rights of children when they are competing, like they are in Article 10 proceedings.<sup>216</sup>

The argument regarding the need for the softer confidentiality measures in Article 10 *Lincoln* hearings because of natural parents’ due process and constitutional rights in raising their children should not carry as much weight as it is presently afforded.<sup>217</sup> For example, an *in camera* inquiry was conducted in *People v. Darden*,<sup>218</sup> a New York Court of Appeals criminal case governed by the Criminal Procedure Law and where constitutional protections are most prevalent.<sup>219</sup> The *Darden* Court conducted an *in camera* inquiry for a confidential informant whose identity was better kept anonymous.<sup>220</sup> During this *in camera* inquiry, the judge instructed the parties that the “prosecutor may be present but not the defendant or his counsel.”<sup>221</sup> In addition, the judge allowed defense counsel to submit a list of questions for the judge to ask the confidential informant on the defendant’s behalf.<sup>222</sup>

Although the judge distributed a summary report of the informant’s testimony to both parties, the judge was significantly more

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<sup>213</sup> *Id.* at 572.

<sup>214</sup> *Sandra S.*, 914 N.Y.S.2d at 863.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 860.

<sup>217</sup> The *Sandra* Court stated, “A Parent in an Article 6 custody case has a no less significant due process right to know and meet the factual evidence that will determine his or her constitutionally protected right to the care and custody of his or her child.” *Sandra S.*, 914 N.Y.S.2d at 862. Despite this fundamental right of a parent, courts keep the Article 6 *Lincoln* hearing transcripts sealed. *Id.* at 861. It follows then that because the *Sandra* court is recognizing the significance of the parental rights in both Article 6 and Article 10 proceedings, the permissible *Lincoln* procedures in Article 6 should be applied in Article 10 proceedings as well. *Id.* at 862, 863.

<sup>218</sup> 313 N.E.2d 49 (N.Y. 1974).

<sup>219</sup> *Id.* at 52.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*



concerned with keeping the identity of the informant anonymous to further protect effective law enforcement than it was in not disclosing the informant's statements.<sup>223</sup> The *in camera* in the case did not implicate any due process or fairness violations.<sup>224</sup> An *in camera*, with defense counsel absent, where the transcript is sealed was utilized in a criminal case, which requires a higher burden of proof,<sup>225</sup> and was found not to violate constitutional protections.<sup>226</sup> It should follow then that the same *in camera* procedure, minus the summary report of the testimony that was distributed in *Darden*, can be implemented in a civil, Article 10 proceeding, which requires a lower burden of proof.<sup>227</sup>

More importantly, utilizing the confidentiality standards seen in Article 6 proceedings and in *Darden* are necessary in Article 10 proceedings to maximize protection of the subject children, which will prevent further psychological and emotional damage. As previously mentioned, the *Lincoln* court recognized that it is essentially common sense to be aware of the potential harm to an already strained parent-child relationship if that same child is forced to openly disclose the issues surrounding the relationship.<sup>228</sup> In a blog post written by Rebecca Decoster,<sup>229</sup> she affirmed, "Testifying in court is stressful for adults, more so for a child. Cross-examination can be brutal. The negative psychological impact of testifying against a parent in an emotionally-charged courtroom cannot be measured."<sup>230</sup>

Allowing a child's private *Lincoln* hearing transcript to be left unsealed could have the same psychological effect, as the parent would be free to view the content of the transcript and share that transcript for anyone's viewing pleasure.<sup>231</sup> This can compound the trauma to

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<sup>223</sup> *Darden*, 313 N.E.2d at 52.

<sup>224</sup> *Id.*

<sup>225</sup> CORNELL UNIVERSITY LAW SCHOOL, [https://www.law.cornell.edu/wex/burden\\_of\\_proof](https://www.law.cornell.edu/wex/burden_of_proof) (last visited Feb. 18, 2017) (providing that the burden of proof in criminal cases is on the prosecution to establish the fact of a defendant's guilt beyond a reasonable doubt).

<sup>226</sup> *Darden*, 313 N.E. 2d at 52.

<sup>227</sup> § 1046(b)(i) (Westlaw) ("[A]ny determination that the child is an abused or neglected child must be based on a preponderance of evidence," during a fact-finding hearing).

<sup>228</sup> *Lincoln*, 247 N.E.2d at 660.

<sup>229</sup> Rebecca Decoster is a former associate attorney in Varnum, LLP, in Michigan, and a current referee with Oakland County Friend of the Court.

<sup>230</sup> Rebecca Decoster, *Kids on the Hot Seat: Child Witnesses in Divorce*, VARNUM LAW (Mar. 24, 2015), <http://www.varnumlaw.com/blogs/varnum-etc/kid-on-the-hot-seat-child-witnesses-in-divorce>.

<sup>231</sup> *Sandra S.*, 914 N.Y.S.2d at 859.

children.<sup>232</sup> It can have significant adverse effects on any and potentially all familial relationships the children have, such as grandparents, aunts and uncles on both the maternal and paternal sides of the family.<sup>233</sup> Judge J. Dean Lewis, the March 2007 editor of *The Judge's Page Newsletter*,<sup>234</sup> wrote, "The life of each child who has suffered abuse or neglect is critically affected by both the incident itself and the response of those who intervene."<sup>235</sup> Reunification of a family will not occur if it may result in the child being "retraumatized."<sup>236</sup>

Sarah Kroll,<sup>237</sup> an attorney for the Children's Law Center in Denver, Colorado, explained re-traumatization as "feelings that the traumatizing event . . . is happening to them again."<sup>238</sup> Further, children may suffer long-term, both physically and mentally, from the initial traumatic incident and any subsequent re-traumatization.<sup>239</sup> It would be difficult for children, in a situation like this, to live comfortably and easily under the same roof as the parent who caused the original trauma.<sup>240</sup> Whether it is a custody and visitation matter or an abuse and neglect matter, a presiding judge may issue an order removing the children from the home and placing them in the custody

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<sup>232</sup> *Id.* at 863.

<sup>233</sup> *Id.*

<sup>234</sup> Judge J. Dean Lewis, *The Judges' Page Newsletter*, COURT APPOINTED SPECIAL ADVOCATES FOR CHILDREN, (Mar. 2007), [http://www.casaforchildren.org/atf/cf/%7B9928CF18-EDE9-4AEB-9B1B-3FAA416A6C7B%7D/0702\\_children\\_and\\_youth\\_involved\\_in\\_the\\_court\\_experience\\_issue\\_0119.pdf](http://www.casaforchildren.org/atf/cf/%7B9928CF18-EDE9-4AEB-9B1B-3FAA416A6C7B%7D/0702_children_and_youth_involved_in_the_court_experience_issue_0119.pdf).

<sup>235</sup> *Id.*

<sup>236</sup> C.A. v. Indiana Department of Social Services, 15 N.E.3d 85, 96 (Ind. Ct. App. 2014).

<sup>237</sup> Sarah Kroll authored a 2015 article in Volume 35, Issue 3 of the Children's Legal Rights Journal, 35 CHILD. LEGAL RTS. J. 258 (2015), while attending Loyola University of Chicago, School of Law.

<sup>238</sup> Sarah Kroll, *Opposing Viewpoints: The Sixth Amendment and Child Witnesses*, 35 CHILD. LEGAL RTS. J. 258, 258 (2015).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* ("Making a child face their alleged attacker and answer questions about the traumatic crime against them can cause further harm to them, making their experience and the abuse against them that much worse."); For example, it is common for the initial act of trauma to be triggered by things such as, "places, people, experiences, changes to his or body that occurred as a result of the trauma, or sensory stimuli that prompt memories of the original trauma." Barbara Ryan, Judge Cynthia Bashant & Deena Brooks, *Protecting and Supporting Children in the Child Welfare System and the Juvenile Court*, 57 JUVENILE AND FAMILY COURT JOURNAL, 61, 63 (Winter 2006) [hereinafter Ryan, *Protecting and Supporting*]. More specifically, "Exposure to rooms similar to those in which the trauma occurred; Exposure to sounds or smells that remind the child of the traumatic event; Exposure to voices or words connected with the trauma for the child; and, Exposure to the perpetrator of the trauma." Ryan, *Protecting and Supporting*, *supra* note 240.

of someone other than the natural parent.<sup>241</sup> It may be possible for children, placed with a relative after removal, to experience trauma reminders.<sup>242</sup> In particular, the “words connected to the trauma” trigger may be pertinent if a parent gave access to a relative with whom the children are temporarily placed.<sup>243</sup> For example, the relative could, accidentally or on purpose, utter the traumatizing words in the children’s presence, and thus, risk re-traumatization.<sup>244</sup> Moreover, the trauma may be further compounded if the parent and other relatives know what the children said to the judge about the parent during the children’s Article 10 “modified” *Lincoln* hearing.<sup>245</sup>

The Court of Appeals of Indiana, in *C.A. v. Indiana Department of Social Services*,<sup>246</sup> characterized re-traumatization as “a very negative thing because the more repeated trauma a child suffers, the less likely they are to heal.”<sup>247</sup> This provides even more of a justification to leave the transcript sealed so it does not end up in the wrong person’s hands. Re-traumatizing children by a parent having the ability to communicate the content of his children’s testimony to other family members would significantly undermine children’s best interests and would make the Article 10 goal of reunification impossible.<sup>248</sup>

## VI. CONCLUSION

Upholding constitutional protections, even in civil matters, is undoubtedly of great import.<sup>249</sup> However, when upholding these fundamental protections come at the expense of children, specifically in Family Court where litigants do not have the same constitutional protections as in criminal court, the protections must yield in favor of the best interests of the children.<sup>250</sup> Family Court judges are expected

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<sup>241</sup> Tompkins County Court, *The Family Court and You! (A Citizen’s Guide to the Family Court)*, NEW YORK STATE UNIFIED COURT SYSTEM, <https://www.nycourts.gov/courts/6jd/tompkins/family/you.shtml#top>. (last visited Jan. 21, 2017).

<sup>242</sup> Ryan, *Protecting and Supporting*, *supra* note 240, at 63.

<sup>243</sup> *Sandra S.*, 914 N.Y.S.2d at 859.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 863.

<sup>246</sup> 15 N.E.3d 85 (Ind. Ct. App. 2014).

<sup>247</sup> *Id.*

<sup>248</sup> *Sandra S.*, 914 N.Y.S.2d at 863.

<sup>249</sup> See discussion *supra* Section II.C.

<sup>250</sup> See discussion *supra* Section II.C.

to protect the best interests of subject children both within the four walls of their courtrooms, especially during the sensitive and emotional proceedings of Article 6 and Article 10, and when the subject children are outside of Family Court.<sup>251</sup>

*Lincoln* hearings are conducted in both proceedings to protect children's best interests by preventing them from openly choosing between their parents for Custody and Visitation and reliving the initial traumatic experience by testifying in open court in Abuse and Neglect proceedings.<sup>252</sup> It is ironic that, as it stands, the often more traumatic experiences related to Abuse and Neglect (Article 10) matters receive less strict protection when compared to the protections offered in Custody and Visitation (Article 6) matters.<sup>253</sup> Accordingly, the strict confidential *Lincoln* hearing procedures utilized in Article 6 matters, namely both parents and their attorneys being prohibited from participating in the hearing and the hearing transcript remaining sealed, should be adopted in full for Article 10 proceedings.<sup>254</sup> This will provide full protection for the subject children and guarantee that the subject children will not be re-traumatized ensuring the children's best interests.<sup>255</sup>

Therefore, the ultimate goal of protecting children and doing what is in their best interests would be more attainable, and the risk of re-traumatization to the children would be substantially reduced if all stages of Article 10 proceedings remain highly confidential tantamount to the Article 6 proceedings.<sup>256</sup> This would ensure that the court acts in the best interests of the children, and make family reunification in Article 10 proceedings a realistic, absolute goal to be reached within the twelve-month standard from the commencement of a proceeding.<sup>257</sup>

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<sup>251</sup> See discussion *supra* Section III.A.

<sup>252</sup> See discussion *supra* Section IV.

<sup>253</sup> See discussion *supra* Section IV.

<sup>254</sup> See discussion *supra* Section V.

<sup>255</sup> See discussion *supra* Section V.

<sup>256</sup> See discussion *supra* Section V.

<sup>257</sup> See discussion *supra* Sections I and V.